



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Release Number: **200836032**

Release Date: 9/5/08

Date: June 10, 2008

UIL Code 4942-03-05

Contact Person:

Identification Number:

Telephone Number:

Employer Identification Number:

Legend:

N =

O =

P =

X =

Y =

Z =

Dear

This is in reply to your ruling request dated January 17, 2006 regarding the application of sections 4942 and 4945 of the Internal Revenue Code ("Code") to your proposed expenditures to construct a memorial on government property.

FACTS:

You have been recognized as an organization exempt under section 501(c)(3) of the Code and are classified as a private foundation within the meaning of section 509(a). You are a grant-making organization and your purposes are to receive and administer funds exclusively for religious, charitable, scientific, literary, or educational purposes, including, but not limited to making gifts and contributions to one or more organizations (other than organizations testing for public safety) described in section 501(c)(3).

You plan to purchase all required materials and services to construct, through a private, independent, licensed contractor ("Contractor"), a memorial ("Memorial") for the N, which is located within O, a training facility of the P. O is located in the state of X. P, which owns and operates N, is a political subdivision of the government.

N was established in order to provide a location to honor the state and federalized organizations that have served the United States and/or the state of X during times of mobilization, conflicts and major wars. The Post Commander of O adopted a Policy Memo which provides that an organization desiring to sponsor the construction of a memorial at the N cannot make cash donations to the O, but rather must contract with a private,

independent, licensed contractor to purchase all necessary materials and perform all necessary services to construct the memorial on the sponsoring organization's behalf.

You propose to construct the Memorial to honor the military actions of the Y and the Z under the guidelines set forth in the Policy Memo. The cost of the construction of the Memorial is estimated to be less than \$20,000, based on the cost of construction of similar memorials at N.

You have received verbal approval from P for the placement of the Memorial. You represented that formal written approval will be requested upon receipt of a favorable letter ruling from us and this written approval will be obtained prior to actual placement of the Memorial. The Memorial will be placed in a location that has been designated by P as a memorial park for purposes of placing a number of similar memorials. You have selected Contractor to provide all necessary material and services to construct the Memorial. You have represented that neither the Contractor, nor any other sub-contractor, or other person who has been or will be dealt with in connection with the design, construction, completion or any other aspect of the Memorial is or will be a disqualified person with respect to you, as determined under section 4946 of the Code.

The contract to be entered into between you and the Contractor will provide for an initial deposit to be paid by you to the Contractor. Thereafter, additional monies will be paid by you to the Contractor from time to time as the work is completed. You represent that you will monitor the progress of the construction of the Memorial and make payments only after you are satisfied that the work is satisfactorily completed. The amounts to be paid to the Contractor will reflect the fair market value for the materials received and the services performed.

RULINGS REQUESTED:

You requested the following rulings:

1. The expenditure of a portion of your assets for the construction of the Memorial will constitute a "qualifying distribution" under section 4942(g) of the Code.
2. The expenditure of a portion of your assets for the construction of the Memorial will not constitute a "taxable expenditure" under section 4945(d) of the Code.
3. The expenditure of a portion of your assets through the engagement of an independent private contractor to supply the materials and services needed to construct the Memorial constitutes either a grant to a section 509(a)(1) of the Code organization or a "direct" expenditure for charitable purposes and does not constitute a grant to an "organization" under section 4945(d)(4) for which "expenditure responsibility" must be exercised by you in accordance with section 4945(h).
4. The amount of the "qualifying distribution" under section 4942(g) of the Code will be the full amount expended by you to construct the Memorial, not the fair market value of the Memorial after completion of its construction.

LAW:

Section 170(c) of the Code defines a "charitable contribution" as a contribution or gift to or for the use of (1) a state, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes, (2) a corporation, trust, or community chest, fund, or foundation . . . (B) organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.

Section 501(c)(3) of the Code provides for the exemption from federal income tax of organizations organized and operated "exclusively" for religious, charitable, educational, or other specified exempt purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which does not engage in proscribed legislative or political activities.

Section 4942(a) of the Code imposes a tax on the undistributed income of a private foundation.

Section 4942(c) of the Code provides that the term "undistributed income" means, with respect to any private foundation for any taxable year as of any time, the amount by which –

- (1) the distributable amount for such taxable year, exceeds
- (2) the qualifying distributions made before such time out of such distributable amount.

Section 4942(g)(1) of the Code defines a "qualifying distribution" as (a) any amount (including that portion of reasonable and necessary administrative expenses) paid to accomplish one or more purposes described in section 170(c)(2)(B), other than any contribution to (i) an organization controlled (directly or indirectly) by the foundation or one or more disqualified persons with respect to the foundation, except as otherwise, provided, or (ii) a private foundation which is not an operating foundation, except as otherwise provided; or (b) any amount paid to acquire an asset used (or held for use) directly in carrying out one or more purposes described in section 170(c)(2)(B).

Section 4945 of the Code imposes a tax on any "taxable expenditure" (as defined in section 4945(d)) made by a private foundation.

Section 4945(d) of the Code provides in relevant part, that the term "taxable expenditure" includes any amount paid or incurred by a private foundation "(4) as a grant to an organization unless--(A) such organization--(i) is described in paragraph (1) or (2) of section 509(a), (ii) is an organization described in section 509(a)(3) (other than an organization described in clause (i) or (ii) of section 4942(g)(4)(A)), or (iii) is an exempt operating foundation (as defined in section 4940(d)(2)), or (B) the private foundation exercises expenditure responsibility with respect to such grant in accordance with subsection (h), or (5) for any purpose other than one specified in section 170(c)(2)(B)."

Section 1.501(c)(3)-1(d)(2) of the Income Tax Regulations ("regulations") provides that the term "charitable" is used in section 501(c)(3) of the Code in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of

other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes...erection or maintenance of public buildings, monuments, or works.

Section 53.4942(a)-3(a)(1) of the Foundation and Similar Excise Tax Regulations ("Foundation regulations") states that the amount of a qualifying distribution of property is the fair market value of such property as of the date such qualifying distribution is made. The amount of an organization's qualifying distributions will be determined solely on the cash receipts and disbursements method of accounting described in section 446(c)(1) of the Code.

Section 53.4942(a)-3(a)(2) of the Foundation regulations defines the term "qualifying distribution," in relevant part, to mean any amount (including program related investments and reasonable and necessary administrative expenses) paid to accomplish one or more purposes described in section 170(c)(1) or (2)(B) of the Code, other than any contribution to a private foundation which is not an operating foundation or to an organization controlled (directly or indirectly) by the contributing private foundation or one or more disqualified persons with respect to such foundation.

Section 53.4942(b)-1(b)(1) of the Foundation regulations provides that qualifying distributions are not made by a foundation directly for the active conduct of activities constituting its charitable, educational, or other similar exempt purpose unless such qualifying distributions are used by the foundation itself, rather than by or through one or more grantee organizations which receive such qualifying distributions directly or indirectly from such foundation.

Section 53.4945-4(a)(2) of the Foundation regulations provides that, for purposes of section 4945 of the Code, the term "grants" shall include, but is not limited to, such expenditures as scholarships, fellowships, internships, prizes, and awards. Grants shall also include loans for purposes described in section 170(c)(2)(B) and "program related investments" (such as investments in small businesses in central cities or in businesses which assist in neighborhood renovation). Similarly, "grants" include such expenditures as payments to exempt organizations to be used in furtherance of such recipient organizations' exempt purposes whether or not such payments are solicited by such recipient organizations. Conversely, "grants" do not ordinarily include salaries or other compensation to employees. For example, "grants" do not ordinarily include educational payments to employees which are includible in the employees' incomes pursuant to section 61. In addition, "grants" do not ordinarily include payments (including salaries, consultants' fees and reimbursement for travel expenses such as transportation, board, and lodging) to persons (regardless of whether such persons are individuals) for personal services in assisting a foundation in planning, evaluating or developing projects or areas of program activity by consulting, advising, or participating in conferences organized by the foundation.

Section 53.4945-6(b)(1) of the Foundation regulations provides, in part, that, funds used in furtherance of purposes described in section 170(c)(2)(B) of the Code ordinarily will not be treated as taxable expenditures under section 4945(d)(5).

Section 53.4945-6(b)(1)(v) of the Foundation regulations provides that the term "taxable expenditure" does not include payments which constitute "qualifying distributions" under section 4942(g) of the Code.

ANALYSIS:

Ruling One:

A "qualifying distribution" under section 4942(g) of the Code includes any amount paid to accomplish one or more tax-exempt purposes described in section 170(c)(2)(B). Section 170(c)(2)(B) provides, in part, that a charitable contribution means a contribution or gift to a corporation organized and operated exclusively for charitable purposes. Other tax exempt purposes may fall within the broad outlines of "charity" and includes erection or maintenance of public buildings, monuments, or works. See section 1.501(c)(3)-1(d)(2) of the regulations.

Since you are erecting a memorial on and for the use of a political subdivision of the United States and the gift is for public purposes, your expenditure is for a purpose described in section 170(c)(2)(B) of the Code. Thus, the proposed expenditure for the construction of the Memorial will constitute a "qualifying distribution" under section 4942(g).

Ruling Two:

The term "taxable expenditure" does not include payments which constitute "qualifying distributions" under section 4942(g) of the Code. See section 53.4945-6(b)(1)(v) of the Foundation regulations. Since your expenditure to build the Memorial is a "qualifying distribution" as discussed above, it is not considered a taxable expenditure under section 4945(d)(5).

Additionally, the term "grants" does not ordinarily include payments to persons (regardless of whether such persons are individuals) for personal services in assisting a foundation in planning, evaluating or developing projects. See section 53.4945-4(a)(2) of the Foundation regulations. Since your expenditure is for services by the for-profit Contractor to build the Memorial on your behalf, the amounts you expend are not considered grants under section 4945 of the Code. Therefore, the expenditure of funds directly paid by you to the Contractor in order to build the Memorial in accordance with a contract for services is not a grant and therefore not a taxable expenditure under section 4945(d)(4).

Ruling Three:

Since the amounts you expend are not considered grants under section 4945 of the Code, the expenditure of funds directly paid by you to the Contractor in order to build the Memorial is not a grant and you are not required to exercise expenditure responsibility. See section 53.4945-4(a)(2) of the Foundation regulations.

Ruling Four:

Because the expenditures are "qualifying distributions" and because they are amounts paid to accomplish one or more exempt purposes and not amounts paid to acquire an asset used directly in carrying out one or more of your purposes, the expenditures must be valued as of the date such qualifying distribution is made, and therefore the date payments are made to the Contractor. Since the amount of the qualifying distributions is determined solely on the cash receipts and disbursements method of accounting, they are therefore equal to the cash disbursements paid to the Contractor as outlined above. See section 53.4942(a)-3(a)(1) of the Foundation regulations.

RULINGS:

Therefore, we rule as follows:

1. The expenditure of a portion of your assets for the construction of the Memorial will constitute a "qualifying distribution" under section 4942(g) of the Code.
2. The expenditure of a portion of your assets for the construction of the Memorial will not constitute a "taxable expenditure" under section 4945(d) of the Code.
3. You do not have to exercise "expenditure responsibility" with respect to the construction of the Memorial since your expenditure is not considered a grant under section 4945 of the Code.
4. The amount of the "qualifying distribution" under section 4942(g) of the Code will be the amount of the cash payments made by you to the Contractor on the date payments are made for the purpose of constructing the Memorial.

This ruling will be made available for public inspection under section 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose*. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Robert C. Harper, Jr.
Manager, Exempt Organizations
Technical Group 2

Enclosure
Notice 437